

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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|--------------------------------|---|----------------------|
| In the Matter of |) | |
| |) | |
| Amendment of Section 73.202(b) |) | MB Docket No. 03-155 |
| Table of Allotments, |) | RM-10735 |
| FM Broadcast Stations. |) | |
| (Montauk, New York) |) | |

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: February 4, 2004

Released: February 9, 2004

By the Assistant Chief, Audio Division:

1. The Audio Division considers herein the *Notice of Proposed Rule Making* (“Notice”)¹, issued at the request of Dana J. Puopolo (“Petitioner”), proposing the allotment of Channel 261A to Montauk, New York, as that community’s third local aural transmission service. Petitioner filed comments reiterating an intention to apply for Channel 261A if allotted to Montauk, as requested. AAA Entertainment Licensing LLC (“AAA Entertainment”) filed opposing comments. Cox Radio, Inc. and CXR Holdings, Inc. (collectively “Cox Radio”), filed joint opposing comments and supplemental comments.² Petitioner filed reply comments and supplemental comments. There were no counterproposals or additional comments received in response to this proceeding.

2. As stated in the *Notice*, the proposed allotment of Channel 261A to Montauk, New York requires a site restriction 6.7 kilometers (4.2 miles) east to avoid a short-spacing to the license site of Station WEZN-FM, Channel 260B, Bridgeport, Connecticut.³ Generally, at the allotment stage we only require a petitioner to show that a theoretical reference site exists from which a station can be operated in compliance with the Commission’s rules. The reference site is presumed to be available and technically feasible but that presumption is rebuttable.⁴

3. In its comments, AAA Entertainment asserts that the proposed transmitter site at Montauk is infeasible and unavailable. Specifically, AAA Entertainment alleges that the available area for a fully-spaced reference site is in environmentally-sensitive areas, where construction of a tower would be forbidden by local land use regulation and may have an adverse environmental impact. AAA Entertainment states that the proposed allotment site at Montauk is subject to a full environmental assessment pursuant to

¹ See *Montauk, New York*, 18 FCC Rcd 12799 (MB 2003).

² Initially in its comments, Cox Radio stated that the land for the proposed transmitter site at Montauk was unavailable because the landowner refused to sell or lease it. In its supplemental comments, Cox Radio withdrew the statement and requested it to be stricken from the record.

³ The reference coordinates that were proposed in the *Notice* for Channel 261A at Montauk are 41-03-13 NL and 71-52-43 WL.

⁴ *San Clemente California*, 3 FCC Rcd 6728 (MMB 1988), *appeal dismissed sub. nom.*; *Mount Wilson FM Broadcasters, Inc. v FCC*, 884 F.2d 1462 (D.C. Cir. 1989); See also, *San Clemente, California*, 10 FCC Rcd 8291 (1995).

Section 1.1307(a)(4) of the Commission's Rules because of its proximity to the Montauk Point Lighthouse, which is 207 years old and listed in the National Register of Historic Places, No. 69000142. AAA Entertainment submitted a letter from the president of Concerned Citizens of Montauk, Inc. which stated that local citizens are against the tower construction. AAA Entertainment contends that this showing is sufficient to make a *prima facie* case that there is no fully-spaced transmitter sites available for construction of a new station on Channel 261A at Montauk.

4. Cox Radio states that the proposed allotment of Channel 261A at Montauk should be rejected because the proposed transmitter site is technically infeasible and there are no other transmitter sites available for a transmitter. The area is mostly comprised of two state parks, Montauk Point State Park and Camp Hero State Park, as well as the Montauk Lighthouse and Montauk Air Force Station. Cox Radio claims that there is another 68 acres of land held by private parties, which is zoned for residential use only. Cox Radio submitted a letter from a local zoning expert, which stated in his opinion that a radio tower could not be built in this area because of the small area of land available and local environmental, historical, and zoning issues. This opinion is buttressed by the fact that the Commission dismissed a construction permit because the applicants were unable to obtain a suitable transmitter site in this area because of zoning problems.⁵ Moreover, the New York Department of Environmental Conservation ("Department") stated that the private-owned land in this area consists primarily of wetlands. As such, the Department would be against allowing the construction of a tower in this area. Cox Radio submitted photographs that show the area is located in wetlands. In sum, Cox Radio asserts that local zoning, environmental and historical concerns make it virtually impossible to construct a radio tower at the proposed transmitter site or within the area-to-locate.

5. In response, Petitioner contends that the transmitter site is located outside of the Montauk Point State Point and is potentially available for use as a transmitter site. Petitioner claims that the Commission does not require a petitioner to prove that the land is actually available to build a transmitter site at the allotment stage. In its supplemental comments, Petitioner asserts that reasonable assurance of the availability of a potential tower site is not required at the allotment stage. When the availability of a potential transmitter site is raised in comments, the Commission will then make a determination on the reasonable likelihood that the proposed site is in fact available.⁶ The underlying requirement for an allotment is the reasonable expectation that a useable site is available in compliance with the Commission's minimum distance spacing requirements. Contrary to the Petitioner's assertion, we will not allot a proposed channel absent a reasonable assurance that a transmitter site is available in which will permit a station to operate in compliance with the Commission's technical requirements.⁷

6. The Petitioner submitted no rebuttal evidence to establish the suitability or availability for the proposed transmitter site. Moreover, a further staff engineering analysis reveals that the proposed transmitter site is located in marsh lands. The engineering analysis also determined that no alternate transmitter sites are available in an area that would accommodate the proposal at Montauk in compliance with the Commission's minimum distance spacing requirements. In light of the foregoing evidence, we find that the proposed transmitter site is unavailable and technically infeasible at Montauk. In addition, the Petitioner has failed to provide a reasonable assurance that the proposed transmitter site at Montauk is available and suitable for the proposed allotment of Channel 261A at Montauk. On the basis of the record in this proceeding, we deny the proposal to allot Channel 261A at Montauk.

⁵ See *Women Broadcasters, Inc., Montauk, New York*, 12 FCC Rcd 7824 (1997).

⁶ See *Sebring and Miami, FL*, 10 FCC Rcd 6577 (MMB 1995) and *Kimberly, Idaho*, 15 FCC Rcd 10298 (MMB 2000).

⁷ See *Bay Shore, NY et al.*, 20 RR 2d 1556 (1970) and *Creswell, Oregon*, 3 FCC Rcd 4608 (MMB 1988).

7. Accordingly, IT IS ORDERED, That the petition for rule making filed by Dana J. Puopolo proposing the allotment of Channel 261A to Montauk, New York, IS DENIED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Rolanda F. Smith, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau